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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 323

FAIRCHESTER OIL CO., INC.,

Petitioner,

against

FIRST NATIONAL BANK OF NEW ROCHELLE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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August 26, 1944.

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The petitioner applies to review a decision of the New York Court of Appeals holding that under the terms of a lease of a gas station which gave a privilege of cancellation under stated circumstances (R. 53) petitioner was not justified in attempting to cancel because of the issuance of Limitation Order L-70 by the War Production Board, which limited the amount of gasoline deliverable *to* service stations and the hours during which such gasoline was deliverable *by* such stations (R. 67).

The Facts

We point out in addition to the facts detailed in the petition herein, that the petitioner failed to deliver possession of the demised premises until July 25th, 1942 (R. 71) altho Limitation Order L-70 became effective March 19,

1942 (R. 67) and the lease provided that cancellation should be had "on and as of the date the right to maintain said station * * * is so denied" (R. 53).

Jurisdiction

This Court is without jurisdiction herein because (1) No federal question was raised below. (2) No federal question arises in this case. (3) Decision of the alleged federal question would not be decisive of the case.

(1)

The petition herein fails wholly to comply with Rule XII, Paragraph 1 of this Court as required by Rule XXXVIII, Paragraph 2 thereof.

The petitioner makes no effort to point out from the record where the supposed federal question propounded was brought to the attention of the Courts below and an examination of the record discloses the impossibility of so doing.

The record contains no certificate by any Court that any federal question was presented to it. Application was made to the New York Court of Appeals to amend the remittitur by adding thereto "that the Court determined that Paragraph 10 of the contract of lease must be construed as excluding from its scope regulations issued under the Second War Powers Act by the War Production Board and the Office of Price Administration of the United States Government". This application was denied (New York Law Journal, July 21, 1944, Vol. 112 p. 17) on the ground "that the proposed question is not one of federal cognizance".

It follows that upon this record, no question is presented which this Court may review.

McGoldrick v. *Gulf Oil Corporation,* 309 U. S. 2.

(2)

The supposed federal question propounded by petitioner is not within the concept of Section 237 (b) of the Judicial Code inasmuch as it involves no question of interpretation or validity of any federal statute or regulation nor does it affect any privilege or immunity arising by reason thereof.

The sole question of interpretation involved was purely a State question of the meaning of a lease. The meaning of the federal regulation was never in dispute nor raised by petitioner.

(3)

Decision of the alleged federal question suggested by petitioner would not necessarily be decisive of this case. The entire controversy may well have been and perhaps was disposed of upon the ground that petitioner failed to avail itself of the terms of the privilege of cancellation under Paragraph 10 of the lease assuming arguendo that it had any such privilege.

ARGUMENT

The question suggested by petitioner is not a federal one.

As we have shown, the record as presented by this Court fails utterly to disclose that any federal question was disposed of by any of the Courts below and we believe the petition must be dismissed on this ground.

The petitioner asks this Court (petition 10) to *imply* a federal question on the ground that the decision herein under "guise of construction" is really based upon a federal consideration and in effect is interposing an obstruc-

tion to the full application of a regulation issued under the Second War Powers Act. The fallacious nature of this contention is exposed when it is observed that the decision below in fact has not impaired, limited or in any wise obstructed the actual enforcement of Order L-70. It has not authorized the delivery of any greater quantity of gasoline to the service station nor the delivery therefrom during a greater period than that authorized by the Order.

As we read the petition and accompanying brief, this is the sole ground relied upon for invoking the jurisdiction of this Court.

The decision in this case, however, is concerned not with the federal order but with the provisions of the lease itself. It is plain from the opinion of the Appellate Division (R. 79-81) that its decision was to the effect that the terms of the lease contemplated "real property" restrictions and not business regulations. The petitioner has never contended that the effect of Federal Order L-70 was other than a regulation of business. There never was any dispute as to the meaning or effect of Order L-70. Petitioner has never contended and does not now contend that any of the Courts below erroneously interpreted the provisions of that Order. The controversy thruout the litigation has been as to whether Paragraph 10 of the lease was broad enough to embrace a regulation clearly directed to the business conducted upon as distinguished from a restriction upon the demised premises, qua real estate.

Any business regulation would have raised the same question of interpretation whether it emanated from a federal or local statute or from a rule or regulation of the federal government of the state government or from a local agency. The circumstance, therefore, that a regulation of business arose from a federal order authorized by a federal statute is purely fortuitous and the question of law determined was clearly interpretation of the terms of the lease proper, a state question, pure and simple. Peti-

tioner does not contend that independently of Article 10 of the lease it would have any right of cancellation, a fact which emphasizes the purely local nature of the question at issue and the absence of any federal question.

We think that neither *Railroads* v. *Richmond*, 15 Wall 3, nor *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209, supports petitioner.

The fact that in the former case this Court refused to dismiss the writ of error does not authorize the contention that certiorari ought to be granted in the case at bar in view of the present much more stringent rules regarding jurisdiction, particularly since upon consideration of the merits (19 Wall 584) this Court held that no federal question was involved, in other words that the federal statute did not *ex proprio vigore* authorize repudiation of the contract.

The *Awotin* case is obviously not in point since there the National Bank was prohibited by the federal statute from engaging in the transaction there involved.

We think our contentions are supported by the Supreme Court of Minnesota in the case of *Orme* v. *Atlas Gas & Oil Co.*, 13 N. W. (2d) 757, cited by petitioner and upon which it relies so heavily. It carefully considered (p. 764) the Robitzek case (cited by the Appellate Division herein, R. 81) but carefully distinguished the provisions in the lease before it from the language of the lease in the Robitzek case and stated that consequently it did not consider the Robitzek case in point because while the Robitzek lease did not embrace business regulations the terms of the Orme lease clearly did so.

This also disposes of the contention raised by the petitioner (p. 7) that conflicting decisions by the highest Appellate Courts of two States exist with respect to a "federal" question. There is no conflict. The Orme case reconciles its decision with the Robitzek case and *neither*

Court suggests that the question is a federal one. Even if there were a conflict between the Orme decision and that at bar it is of course not the function of this Court to resolve conflicts between state Courts on purely local questions. Neither Minnesota nor New York is required to follow the other. The "distinctly local point of view" (Pet. brief, p. 11) is precisely what New York is entitled to maintain.

The affirmance below by the Court of Appeals without opinion was under well settled principles not necessarily adoption or affirmance of the grounds of decision by the Appellate Division.

Assuming that the Court of Appeals was in accord with the Appellate Division it may also have decided the case upon another ground which is clearly a non-federal question and that is, that regardless of the scope of the privilege of cancellation granted by Paragraph 10 of the lease, petitioner never properly *availed* itself of the privilege.

Altho L-70 became effective March 19, 1942, the Trial Judge found (R. 71) that defendant, petitioner failed to surrender possession of the premises until July 25th, 1942. The option under its terms was to be exercised "on and as of the date" that the contingency arose. It was urged before the New York Court of Appeals, as well as the lower courts by this respondent, that the defendant (here the petitioner) never did make timely exercise of its right of cancellation and hence lost such right if ever it had any. Particularly in the absence of a certificate from the Court of Appeals, we submit its decision may well have been based upon this ground. It is well supported by authority that a privilege to cancel a lease must be exercised in the manner and within the time prescribed by the instrument which created the privilege.

Goelet v. *Spofford*, 55 N. Y. 647;
The Woodbridge Co. v. *Charles F. Hires Co.*, 19 App. Div. 128 (unanimously affirmed 163 N. Y. 563);

Fine Realty Co. v. *City of New York*, 53 Misc. 246;

Fidelity & Columbia Trust Co. v. *Levin*, 128 Misc. 838 (unanimously affirmed 221 App. Div. 786 and unanimously affirmed 248 N. Y. 551);

Aee Holding Corporation v. *Texas Company*, 150 Misc. 526;

Butler & Herman Co. v. *Meth*, 122 N. Y. Supp. 271 (not officially reported).

If this contention is correct (and its correctness is wholly for determination by the State Court) decision of the question sought to be given consideration by petitioner would not be decisive of the litigation and therefore not reversible error.

CONCLUSION

For the foregoing reasons, this application should be denied.

Respectfully submitted,

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HENRY D. HOLDEN,
MONROE J. CAHN,
Counsel for Respondent.

Dated, August 26, 1944.